

**STATE OF NORTH DAKOTA**  
**GAME AND FISH DEPARTMENT**

IN THE MATTER OF:

Kelly Wade Kapfer

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

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On September 7, 2002, Officer Bill Schaller ("Schaller"), a game warden for the North Dakota Game and Fish Department ("Department") issued to Kelly Wade Kapfer ("Kapfer") a "Report and Notice - Boating Under the Influence - Title 20.1, NDCC" ("Report and Notice form") relating to a possible loss of motorboat privileges resulting from refusal to submit to testing, *i.e.*, a statement of intent to prohibit Kapfer from operation a motor boat or vessel. On September 17, 2002, Kapfer, through his attorney, Darold A. Asbridge, Bismarck, requested an administrative hearing on the matter under N.D.C.C. ch. 20.1-13.1.

On September 19, 2002, the Department requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue findings of fact and conclusions of law, as well as a final order, in regard to the matter. On September 19, 2002, the undersigned ALJ was designated.

Due to the short statutory time frame for holding a hearing (N.D.C.C. § 20.1-13.1-08(1)), and because of when the Report and Notice form was issued and when the request for a hearing was made, the ALJ's staff contacted counsel and scheduled a hearing for October 2, 2002, the last day to hold a hearing without a good cause extension. On September 27, 2002, the ALJ issued a Notice of Hearing and Specification of Issues. The notice was send facsimile to counsel for the

parties, Mr. Asbridge for Kapfer and Assistant Attorney General Paul C. Germolus for the Department.

The hearing was held as scheduled on October 2, 2002, in the Office of Administrative Hearings, Bismarck, North Dakota. Mr. Germolus represented the Department at the hearing. Kapfer was not present at the hearing. Neither was Mr. Asbridge present, nor was anyone else present at the hearing representing Kapfer. The ALJ proceeded with the hearing under the provisions of N.D.C.C. § 20.1-13.1-08(6). Mr. Germolus called one witness, game warden Schaller. Mr. Germolus offered four exhibits (exhibits 1-3) all of which were admitted (red exhibit labels).

The only three issues for this hearing, in accordance with the provisions of N.D.C.C. § 20.1-13.1-08(3), are as follows:

- (1) Whether a game warden or law enforcement officer had probable cause to believe that Kapfer had been operating a motorboat or vessel in violation of N.D.C.C. § 20.1-13-07.
- (2) Whether Kapfer was placed under arrest, and
- (3) Whether Kapfer refused to submit to the chemical test.

At the close of the hearing the ALJ heard oral argument from Mr. Germolus.

Based on the written request for hearing, game warden Schaller's report (exhibit 2), the additional evidence presented at the hearing (exhibits 1 and 3, and the testimony of Schaller), and the oral argument of counsel, the administrative law judge makes the following findings of fact and conclusions of law. *See* N.D.C.C. § 20.1-13.1-08(6). The ALJ finds and concludes that Kapfer was placed under arrest, that Kapfer refused to submit to the chemical test, and that Schaller had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13-07.

Therefore, the provisions of N.D.C.C. § 20.1-13.1-06(1) apply, resulting in a prohibition from operation of a motorboat or vessel.

### **FINDINGS OF FACT**

1. On September 7, 2002, Kapfer was observed by Department game warden Schaller to be operating a motorboat (also "a boat" or "the boat") on the Heart Butte Reservoir (Lake Tschida) in North Dakota. Schaller had specifically gone to Lake Tschida to try and observe Kapfer operating a motorboat because he had obtained information from the Department's Bismarck office that Kapfer may be operating a motorboat on Lake Tschida while his boating privileges were suspended. The Bismarck office informed Schaller that Kapfer had his boating privileges suspended for one year on August 16, 2002. The Bismarck office had forwarded to Schaller a photograph of Kapfer and the boat and other identifying information.

2. At Lake Tschida, on September 7, 2002, Schaller, by means of a high powered "spotting scope," observed Kapfer at the steering wheel operating a boat on Lake Tschida. Schaller also observed Kapfer drinking from a can while in the boat, but he could not read the label of the can.

3. Schaller was on land when he made the observation and he made contact with Kapfer when Kapfer brought the boat into shore a few minutes later.

4. Upon contact with Kapfer on shore, when Kapfer was sitting on a picnic table smoking a cigarette, Schaller smelled a strong odor of alcoholic beverages on Kapfer and noticed that Kapfer's speech was slurred. Schaller asked Kapfer for identification and Kapfer produced his own photo identification. Schaller asked Kapfer whether Kapfer should be boating while his boating privileges were suspended. Kapfer said that his attorney told him he won the administrative hearing and that he could run a boat.

5. Schaller asked Kapfer if he had anything to drink and Kapfer said he had one beer and pointed to the lake. Schaller then asked Kapfer several questions, including whether he was sick or injured. Kapfer replied that he was not. Schaller also asked Kapfer if he was under the care of a doctor or dentist. Kapfer replied that he was not. Schaller also asked Kapfer if he was taking any medication or drugs. Kapfer replied that he was taking penicillin and motrin.

6. Then Schaller proceeded to administer to Kapfer five field sobriety tests. Schaller testified that Kapfer failed all five tests.

7. Schaller testified that after administration of the five field sobriety tests on September 7, it was his opinion that Kapfer was intoxicated and he placed Kapfer under arrest.

8. With some assistance from another law enforcement officer, Schaller transported Kapfer to the Elgin Hospital. At the Elgin hospital, Schaller intended to give Kapfer a blood test, but when he asked Kapfer if he would take a chemical test, Kapfer refused.

9. At the Elgin Hospital, before he asked Kapfer to take a chemical test, Schaller read to Kapfer the "Implied Consent Advisory" on the back of the Report and Notice form, exhibit 1, and he also advised Kapfer of his Miranda rights. He also allowed Kapfer to call his attorney, but Kapfer was unable to reach him. At the Elgin Hospital, Kapfer acknowledged that he had been drinking and said to Schaller, "[c]an I just plead guilty now," and "I drank till 4 in the morning, I'm going to have alcohol in my blood." After Kapfer refused to take a chemical test, Schaller issued to Kapfer the Report and Notice form. Exhibit 1.

10. Schaller also cited Kapfer criminally for boating while under suspension and for boating while under the influence.

### **CONCLUSIONS OF LAW**

1. The evidence shows, by the greater weight of the evidence, that on September 7, 2002, Kapfer was operating a motorboat on Lake Tschida when a Department game warden

observed him. The evidence shows, by the greater weight of the evidence, that as a result of that observation and later contact by the game warden with Kapfer, Kapfer was placed under arrest and refused to submit to a chemical test. The evidence further shows, by the greater weight of the evidence, that the game warden, the arresting officer, had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13.1-07, before he placed Kapfer under arrest and before Kapfer refused to submit to the chemical test.

2. The Department game warden had probable cause for observing Kapfer and stopping to talk to him about boating because of the August 16, 2002, order already issued prohibiting Kapfer from operating a motorboat and the information he had that Kapfer may be illegally operating a boat on Lake Tschida. *See* Exhibit 3. There was a reasonable and articulable reason for stopping to talk to Kapfer after he was observed operating the boat. *See City of Devils Lake v. Lawrence*, 639 N.W. 2d 466 (N.D. 2002); *State v. Ova*, 539 N.W. 2d 857 (N.D. 1995). There was a reasonable and articulable reason to believe that Kapfer had been operating the boat in violation of N.D.C.C. § 20.1-13-07, before he was arrested and refused the chemical test.

3. N.D.C.C. § 20.1-13-07 states, in part, as follows:

20.1-13-07. **Prohibited operation - Penalty.**

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2. No person may operate any motorboat or vessel ... while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana.

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4. N.D.C.C. § 20.1-13.1-14 states as follows:

20.1-13.1-14. **Operation of motorboat or vessel during the period of prohibition -- Penalty.** Any person who operates a motorboat or vessel on the waters of this state during the period the person is prohibited from operating a motorboat or vessel under this chapter is guilty of a class A misdemeanor.

5. On September 7, 2002, the Department's game warden, on a specific mission to observe Kapfer, observed Kapfer operating a boat. Kapfer was prohibited for a period of one year from operating a boat as of August 16, 2002. After Kapfer stopped the boat and came ashore, the game warden approached him to talk about Kapfer operating a boat under prohibition. Even before the game warden began field sobriety tests on Kapfer, he had probable cause to believe Kapfer had been operating a motorboat in violation of N.D.C.C. § 20.1-13-07(2). He had seen Kapfer drink from a can while in the boat. He detected a strong odor of alcohol on Kapfer and noticed that his speech was slurred. Kapfer admitted to drinking one beer. With the sobriety tests, the game warden had even more probable cause. Kapfer failed the five sobriety tests administered by the game warden.

6. Under N.D.C.C. § 20.1-13.1-01, any person who operates a motorboat or vessel in this state is deemed to have given consent, and shall consent ... to a chemical test, or tests, of the blood, breath, saliva or urine for the purpose of determining the alcoholic, other drug, or combination thereof, content of the blood.

7. The Department has the authority, through its director, under N.D.C.C. § 20.1-13.1-06(1), if a person refuses to submit to testing under section 20.1-13.1-01, if probable cause existed, to prohibit the person from operating a motorboat or vessel for a period of two years. N.D.C.C. § 20.1-13.1-06(1)(b). There was evidence adduced at the hearing that Kapfer had been previously prohibited from operating a motorboat for a violation of 20.1-13-07 within a period of five years, in fact, as recently as August 16, 2002.

8. N.D.C.C. § 20.1-13.1-06 states in part as follows:

**20.1-13.1-06. Revocation of privilege to operate motorboat or vessel upon refusal to submit to testing.**

1. If a person refuses to submit to testing under section 20.1-13.1-01, no chemical test may be given, but the game warden ... shall immediately

issue to that person a statement of intent to prohibit the person from operating a motorboat or vessel. The director, upon the receipt of the certified written report of the game warden ... in the form required by the director ... showing that the warden ... had probable cause to believe the person had been operating a motorboat or vessel while in violation of section 20.1-13-07 or had observed that the motorboat or vessel was operated in a negligent, reckless, or hazardous manner as defined by the director by rule, that the person was lawfully arrested if applicable, and that the person had refused to submit to the chemical test under section 20.1-13.1-01, shall prohibit the person from operating a motorboat or vessel in this state for the appropriate period under this section. The period for which a person is prohibited from operating a motorboat or vessel under this section is:

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- b. Two years if the person's record shows that within the five years preceding the most recent refusal under this section, the person has once been prohibited from operating a motorboat or vessel for a violation of this chapter or for a violation of section 20.1-13-07.

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9. N.D.C.C. § 20.1-13.1-08 states, in part, as follows:

20.1-13.1-08. **Administrative hearing on request.**

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3. ...The scope of a hearing for refusing to submit to a chemical test under section 20.1-13.1-01 may cover only the issues of whether a game warden ... had probable cause to believe the person had been operating a motorboat or vessel in violation of section 20.1-13-07; whether the person was placed under arrest; and whether that person refused to submit to the chemical test.

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6. If the person who requested a hearing under this section fails to appear at the hearing without justification, the right to the hearing is waived, and the hearing officer's determination on prohibition of the person from operating a motorboat or vessel will be based on the written request for hearing, game warden's ... report, and other evidence as may be available ...

10. The provisions of N.D.C.C. chs. 20.1-13 and 20.1-13.1, and applicable rules of the Department have been complied with in this administrative action and during the course of this hearing. The evidence shows a violation of the law, the second violation within the last five years, for which Kapfer may be administratively punished under the law.

### **ORDER**

The greater weight of the evidence shows that Kapfer violated the provisions of N.D.C.C. § 20.1-13-07(2). It is ORDERED that under N.D.C.C. § 20.1-13.1-06(1)(b), Kapfer is prohibited from operating a motorboat or vessel in this state for a period of two (2) years from the date of the termination of the one (1) year prohibition resulting from the August 16, 2002, order, *i.e.*, he is prohibited from operating a motorboat or vessel in this state for a period of three (3) years from the date of his receipt of the August 16, 2002, order.

Dated at Bismarck, North Dakota, this 7th day of October, 2002.

State of North Dakota  
Dean Hildebrand, Director  
Game and Fish Department

By: \_\_\_\_\_  
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